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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

DAVID TRINDADE, individually and on behalf of all others similarly situated,

Plaintiff,

v.

REACH MEDIA GROUP, LLC, a Delaware limited liability company,

Defendant,

REACH MEDIA GROUP, LLC, a Delaware limited liability company,

Third-Party Plaintiff,

v.

RYAN LENAHAN, an individual, **KYLE DANNA**, an individual, and **EAGLE WEB ASSETS INC.**, a corporation,

Third-Party Defendants.

Case No. 5:12-cv-04759 (PSG)

THIRD-PARTY DEFENDANT RYAN LENAHAN'S NOTICE OF MOTION AND MOTION TO STRIKE CLAIMS UNDER CAL. CIV. PROC. CODE §425.16 (ANTI-SLAPP MOTION); MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

DATE: February 26, 2013
TIME: 10:00 a.m.
CTRM: 5, 4th Floor
JUDGE: The Hon. Paul S. Grewal

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TO THE COURT, THE PARTIES, AND ALL COUNSEL OF RECORD:

PLEASE TAKE NOTICE that on February 26, 2013 at 10:00 a.m., or at another date and time set by the Court, before the Honorable Paul S. Grewal, United States Magistrate Judge for the United States District Court, Northern District of California, located at the San Jose Courthouse, Courtroom 5, 4th Floor 280 South 1st Street, San Jose, California 95113, Third-Party Defendant Ryan Lenahan will move, and does hereby respectfully move, this Court to strike the third, fourth, and fifth causes of action from the Third-Party Complaint of Third-Party Plaintiff Reach Media Group, LLC ("RMG") under Civil Procedure Code section 425.16.

The Court should strike these claims because: a) the claims are subject to section 425.16 where they are based on allegedly defamatory statements made in a public forum in connection with an issue of public interest, and b) RMG cannot substantiate any of these claims with admissible evidence.

This motion is based upon Civil Procedure Code section 425.16, this notice of motion and motion, the memorandum of points and authorities submitted herewith, the declarations of Ryan Lenahan, Kyle Danna, and Jeffrey M. Rosenfeld in support of this motion, the proposed order submitted herewith, the Third-Party Complaint on file in this action, the record in this case, and any other evidence and argument that may be adduced at hearing.

Respectfully submitted,

DATED: January 18, 2013

KRONENBERGER ROSENFELD, LLP

By: s/Jeffrey M. Rosenfeld
Jeffrey M. Rosenfeld

Attorneys for Third-Party Defendant Ryan Lenahan and for Specially Appearing Third-Party Defendant Kyle Danna

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Third Party Defendant Ryan Lenahan ("Lenahan") entered into a contract with Third Party Plaintiff Reach Media Group, LLC ("RMG"), whereby Lenahan agreed to circulate ads on behalf of RMG. Lenahan fulfilled his obligations under this agreement, circulating ads on behalf of RMG and generating consumer leads for RMG. Based on the terms of the agreement, RMG was obligated to pay Lenahan $13,200 for these leads. RMG refused to make the payment. Instead, RMG concocted a story that Lenahan's ads did not comply with RMG's non-existent guidelines, even though RMG's CEO had personally approved Lenahan's ads.

Thereafter, Lenahan posted a complaint about RMG on a Facebook group: a group dedicated to discussing Internet advertisers/networks that do not pay their publishers, and a group subscribed to by thousands of Facebook members. On the Facebook group, Lenahan described the situation exactly how he understood it: that RMG had improperly withheld over $13,000 that it owed to Lenahan, and that RMG had improperly withheld funds from other publishers as well—a fact that Lenahan had learned after his negative experience with RMG.

Now, RMG has filed a classic example of a SLAPP suit. In an effort to stifle complaints about its business practices, RMG has asserted claims for defamation and tortious interference against Lenahan. However, RMG cannot substantiate any of its claims. Not only are Lenahan's statements true and/or opinions immune from liability, but RMG cannot establish any of the other elements of its claims. Thus, the Court should strike RMG's third, fourth, and fifth causes of action under Civil Procedure Code section 425.16.

BACKGROUND

In the online and mobile advertising context, the term "publisher" refers to a person or business that circulates advertisements (such as through websites, blogs, or emails) in exchange for commissions for referring sales, leads, and/or traffic to an

advertiser's website. As a publisher network, RMG engages publishers to circulate ads on behalf of RMG's advertiser clients. This networked structure is used because it is not always economical or even feasible for an advertiser to procure and manage relationships with the numerous publishers needed to advertise effectively in the online and mobile context.

A. RMG's Relationship with Lenahan

Lenahan is an individual publisher who enrolled in RMG's network on or around August 9, 2012. (Third-Party Complaint ["TPC"] ¶17.) According to RMG, around this time Lenahan entered into a contract with RMG consisting of Terms and Conditions and an Insertion Order. (TPC ¶17.) Under the Terms and Conditions, Lenahan was permitted to display the "Advertisement," which the agreement circularly defined only as an "advertisement." (TPC Ex. A ¶1.) Neither the Terms and Conditions nor the Insertion Order defined the content of any advertisement that Lenahan was to display or limited Lenahan to displaying only advertisements created by RMG. (TPC Ex. A; Declaration of Ryan Lenahan in Support of Lenahan's Anti-SLAPP Motion ("Lenahan Decl.") ¶3 & Ex. A.)

After enrollment, RMG and Lenahan stayed in continual contact via email, instant messaging, and telephone. (Lenahan Decl. ¶4.) RMG instructed Lenahan to circulate various advertisements on behalf of RMG, and RMG monitored Lenahan's performance. (Lenahan Decl. ¶¶5-7.) It was not uncommon for Lenahan and RMG to exchange numerous instant messages, emails, and telephone calls in a single day to discuss Lenahan's advertising efforts. (Lenahan Decl. ¶4.)

Shortly after Lenahan enrolled in RMG's network, Lenahan began submitting proposed advertisements to RMG for approval. (Lenahan Decl. ¶6.) Roger Dowd, RMG's President and CEO, approved Lenahan's proposed ads. (Lenahan Decl. ¶6.) After approval of these ads, Lenahan published the ads and generated a significant number of customer leads for RMG. (Lenahan Decl. ¶6.) Lenahan continued to circulate approved ads on behalf of RMG throughout the end of August and into the first week of

September. (Lenahan Decl. ¶6.) During this time, RMG monitored Lenahan's activities and encouraged Lenahan to continue circulating the ads, and even to increase the circulation. (Lenahan Decl. ¶6.)

On or around August 27, Lenahan submitted an invoice to RMG for $13,200. (Lenahan Decl. ¶9 & Ex. B.) Lenahan expected payment on September 3, pursuant to the "net 7" payment basis set forth in the Insertion Order. (Lenahan Decl. ¶9 & Ex. B.) RMG refused to make the payment. (Lenahan Decl. ¶10.) While Lenahan inquired about the status of the payment on multiple occasions, RMG refused to respond. (Lenahan Decl. ¶10.) Finally, on September 18, 2012, RMG accused Lenahan of circulating non-compliant ads and ceased all communications with him. (Lenahan Decl. ¶11.)

B. RMG's Relationship with Danna

Danna experienced similar problems with RMG. Danna enrolled in RMG's network on or around August 9, 2012. (Declaration of Kyle Danna in Support of Lenahan's Anti-SLAPP Motion ("Danna Decl.") ¶2.) After enrollment, RMG and Danna stayed in continuous contact via email and telephone. (Danna Decl. ¶3.) RMG instructed Danna to circulate various advertisements on behalf of RMG, and RMG monitored Danna's performance. (Danna Decl. ¶¶4-5.) RMG stayed in continuous contact with Danna through September 20. (Danna Decl. ¶7.)

On August 27, 2012 Danna submitted an invoice to RMG for $18,146 for payment pursuant to the "net 15" payment basis RMG had offered to Danna. (Danna Decl. ¶6 & Exs. A-B.) Later that day, RMG informed Danna that RMG would pay him $3,857 on September 10 and $14,080 on September 17. (Danna Decl. ¶6 & Exs. A-B.) However, as of September 17, RMG had not paid Danna the second payment of $14,080. (Danna Decl. ¶8.) Thus, Danna sent several emails and made several phone calls to RMG about the status of this payment. (Danna Decl. ¶8.) In response, on September 17, RMG informed Danna that the second payment would be processed that day. (Danna Decl. ¶8.)

On or around September 18, 2012, Danna received a wire transfer from RMG for $14,080. (Danna Decl. ¶9.) However, later that day, Danna could not access his account through the web interface he typically used. (Danna Decl. ¶9.) When Danna called the bank, he was notified that his account had been frozen because fraud had been reported in connection with the account. (Danna Decl. ¶9.) Upon making additional inquiries at the bank, Danna learned that RMG had claimed that it had not authorized the $14,080 wire, but rather, had indicated that Danna had fraudulently effected the wire. (Danna Decl. ¶10.)

After learning about RMG's false report of fraud, Danna explained to the bank that the RMG wire was valid and that Danna was entitled to the funds. (Danna Decl. ¶11.) Moreover, Danna presented documents to the bank to demonstrate that he was entitled to the funds, including his insertion order with RMG, his invoice to RMG, and his email communications with RMG (*i.e.* communications with Andre Zouvi and Trish Hurst (from RMG's accounting department)). (Danna Decl. ¶11.) After presenting these documents, the bank agreed to unfreeze Danna's account and cancel RMG's wire reversal. (Danna Decl. ¶12.)

ARGUMENT

A strategic lawsuit against public interest (a "SLAPP" suit) is a suit that lacks merit and is brought to obtain an economic advantage over the defendant by increasing the costs of litigation to the point where the defendant's case will be weakened or abandoned. *See U.S. ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.*, 190 F.3d 963, 970-71 (9th Cir. 1999). California enacted the anti-SLAPP statute, Civil Procedure Code section 425.16, to protect individuals from meritless, harassing lawsuits, the purpose of which are to chill protected expression. *Metabolife Int'l, Inc. v. Wornick*, 264 F.3d 832, 838 (9th Cir. 2001).

Section 425.16 provides a mechanism to strike SLAPP claims early in litigation, before the defendant incurs significant fees. To strike a claim under section 425.16, the moving party must first make a prima facie showing that the SLAPP claim arises from an

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act in furtherance of that party's right of petition or free speech under the United States or California Constitution in connection with a public issue. *See Newsham*, 190 F.3d at 971. To make this determination, a court may consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based. *See id*.

If the court finds that the moving party has shown that the claim is subject to the anti-SLAPP statute, the burden then shifts to the plaintiff to demonstrate a probability of prevailing on its claims. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010). To sustain this burden, the plaintiff must demonstrate that its claims are both legally sufficient and supported by a prima facie showing of facts sufficient to sustain a favorable judgment. *See id.* In this respect, an anti-SLAPP motion is akin to a motion for summary judgment. *See Price v. Stossel*, 590 F. Supp. 2d 1262, 1266 (C.D. Cal. 2008). A plaintiff cannot rely solely on the allegations set forth in its pleadings, nor may the court simply accept those allegations. *See id*. Instead, a plaintiff must present competent and admissible evidence showing that it will probably prevail. *See id.* If the plaintiff fails to meet this evidentiary burden, its SLAPP claim must be stricken. *See id.*

Because it is in the public interest to encourage participation in matters of public significance, and because this participation should not be chilled through abuse of the judicial process, courts construe the anti-SLAPP statute broadly. *See Hilton*, 599 F.3d at 902. Under this broad construction, a defendant that brings an anti-SLAPP motion need not show that the plaintiff's suit was brought with the intention to chill the defendant's speech or that any speech was actually chilled. *See Mindys Cosmetics, Inc. v. Dakar*, 611 F.3d 590, 595 (9th Cir. 2010).

Subject to few exceptions, California's anti-SLAPP statute applies in federal court. *Newsham*, 190 F.3d at 972-73.

A. RMG's third, fourth, and fifth claims arise from Lenahan's protected activity under the anti-SLAPP statute.

RMG has asserted five claims against Lenahan. Three of these claims arise from speech protected under the anti-SLAPP statute: a) Count III – Libel Per Se, b) Count IV –

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Tortious Interference with Contractual Relations, and c) Count V – Tortious Interference with Prospective Economic Advantage (collectively, the "SLAPP Claims"). Specifically, each of the SLAPP Claims arises from Lenahan's publication of two statements on the Facebook group: Internet Advertising – People Who Don't Pay (the "Facebook Group"; the allegedly defamatory statements identified in Paragraph 28 of RMG's Third Party Complaint are referred to herein as the "Statements").

As discussed above, a party moving under the anti-SLAPP statute must make an initial showing that the claims at issue arise from an act in furtherance of the moving party's right of petition or free speech under the United States or California Constitution in connection with a public issue. *See Bosley Med. Inst., Inc. v. Kremer,* 403 F.3d 672, 682 (9th Cir.2005). Such acts include:

> (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest. Civ. P. Code §425.16(e)

Lenahan's statements on the Facebook Group satisfy prong three of this test—*i.e.* they are written statements made in a public forum in connection with an issue of public interest.

1. The Facebook Group is a public forum because it is a website that is generally accessible to the public.

As an initial matter, the Facebook Group constitutes a public forum, as that term is used in section 425.16(e)(3). California courts have routinely found that Internet websites, particularly blogs, chat rooms, and other interactive websites, constitute public fora. *See MCSi, Inc. v. Woods*, 290 F. Supp. 2d 1030, 1033 (N.D. Cal. 2003) (finding that Yahoo! website chat room, dedicated to discussing a corporation, was a public forum for purposes of §425.16.); *New.Net, Inc. v. Lavasoft*, 356 F. Supp. 2d 1090, 1107 (C.D. Cal.

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2004) ("Considering that the internet provides the most participatory form of mass speech yet developed, it is not surprising that courts have uniformly held or, deeming the proposition obvious, simply assumed that internet venues to which members of the public have relatively easy access constitute a 'public forum' or a place 'open to the public' within the meaning of section 425.16.") (internal citations and quotations omitted); *Kronemyer v. Internet Movie Data Base, Inc.*, 150 Cal. App. 4th 941, 950 (2007) (finding that "[u]nder its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication." Because statements on a website are accessible to anyone who chooses to visit the site, they "hardly could be more public"); *Barrett v. Rosenthal*, 40 Cal. 4th 33, 41 n.4 (2006) ("Web sites accessible to the public, like the "newsgroups" where Rosenthal posted Bolen's statement, are "public forums" for purposes of the anti-SLAPP statute.").

Because the Facebook Group is an interactive website forum, where members of the public can freely post statements and read others' statements, the Facebook Group is a public forum as that term is used in section 425.16(e)(3). (Declaration of Jeffrey M. Rosenfeld in Support of Lenahan's Anti-SLAPP Motion ("Rosenfeld Decl.") *passim*.)

2. The Statements concern an issue of public interest because they are about an ongoing dispute of interest to a distinct group.

In addition to showing that the Statements were made in a public forum, to qualify for anti-SLAPP protection, Lenahan must show that the Statements concern an issue of public interest. Here, the public's interest is evident. Specifically, the Statements were posted on an Internet website, which is subscribed to by over 2,000 members, and which is dedicated precisely to the issues raised in the Statements.

The public interest requirement of section 425.16(e)(3) must be construed broadly to encourage participation by all segments of society in vigorous public debate. *See Gilbert v. Sykes*, 147 Cal. App. 4th 13, 22 (2007). Thus, courts have broadly construed the phrase "issue of public interest" to include any issue in which the public is interested; the issue need not be significant; it is enough that the public takes an interest in it. *See*

Nygard, Inc. v. Uusi-Kerttula, 159 Cal. App. 4th 1027, 1042 (2008). The public interest requirement is not limited to governmental matters; rather the term has been interpreted expansively to include private conduct that has a broad interest. *See Hailstone v. Martinez*, 169 Cal. App. 4th 728, 737 (2008).

Moreover, the public interest is not limited to topics of general interest to the public at large, but also covers matters of interest to a specific group, where the speech occurs in the context of an ongoing dispute or discussion. *See Du Charme v. Int'l Broth. of Elec. Workers, Local 45*, 110 Cal. App. 4th 107, 119 (2003). Thus, in *Wilbanks v. Wolk*, 121 Cal. App. 4th 883, 899-900 (2004), the court found that statements warning consumers not to use the plaintiff's brokerage services were connected to an issue of public concern even though the statements were not of interest to the public at large. Similarly, in *Thomas v. Quintero*, 126 Cal. App. 4th 635, 647 (2005), the court found that the defendant's activities in protesting the maintenance and eviction practices of a landlord dealt with an issue of public interest because the activities affected the broader interests of all of the landlord's tenants. And in *Damon v. Ocean Hills Journalism Club*, 85 Cal. App. 4th 468, 479 (2000), the court found that critical statements about the general manager of a 3,000 member senior citizen residential community concerned a public issue because the challenged statements related to the future management and leadership of the residential community as a whole. In summary, a statement is made in connection with an issue of public interest under section 425.16(e)(3) where the statement concerns an ongoing dispute or concern with a business or organization, and where the statement is of interest to a distinct segment of the population.

Several facts demonstrate that the Statements in this case were made in connection with an issue of public interest under this standard. First, the Facebook Group is an Internet-based social media group, which is accessible by any person. (Rosenfeld Decl. ¶2-3 & Ex. A.) The Facebook Group is subscribed to by 2,244 members, and in all likelihood, is viewed by many, many more—*i.e.* an Internet user does not need to become a member of the Facebook Group to view its contents. (Rosenfeld

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Decl. ¶¶5-6 & Ex. A.) Moreover, statements posted on the Facebook Group are syndicated to the website located at <shoemoney.com>, which experiences over ten thousand visits per month. (Rosenfeld Decl. ¶8 & Ex. C.)

Second, the Facebook Group is specifically dedicated to the issue of Internet publisher networks that do not pay their publishers. (Rosenfeld Decl. ¶5-6 & Ex. A.) To wit, the Facebook Group is designed to provide a forum where Internet publishers can warn other publishers about networks that have failed to pay their publishers, exhorting members to "[c]all them out and let the world know." (Rosenfeld Decl. ¶5-6 & Ex. A.) Thus, as in *Wilbanks*, warnings to publishers on the Facebook Group relate to an issue of public interest, even if they are not of interest to the public at large.

Third, the Statements at issue are closely related to the purpose of the Facebook Group—*i.e.* the Statements warn publishers that Roger Dowd and RMG have failed to pay their publishers. (Rosenfeld Decl. ¶7 & Ex. B.) The membership's interest in the Statements is evidenced by the fact that several members of the Facebook Group took the time to provide public, written responses to the Statements. (Rosenfeld Decl. ¶7 & Ex. B.)

Because the Statements concern an ongoing dispute that is relevant to a distinct segment of the population, the Statements concern an issue of public interest under section 425.16(e)(3).

B. RMG cannot establish prima facie claims for defamation or tortious interference.

Because Lenahan has shown that RMG's third, fourth, and fifth claims are subject to the anti-SLAPP statute, the burden shifts to RMG to demonstrate a probability of prevailing on its claims. *See Hilton v. Hallmark Cards*, 599 F.3d 894, 903 (9th Cir. 2010). To sustain this burden, RMG must demonstrate that its claims are both legally adequate and supported by a prima facie showing of facts sufficient to sustain a favorable judgment. As discussed below, RMG cannot establish a prima facie claim for any of its SLAPP claims.

1. RMG cannot establish a claim for defamation because the Statements are true and/or protected opinion.

To prove a claim for defamation, RMG must submit evidence of: a) a publication, that is b) false, c) defamatory, and d) unprivileged, and that e) has a natural tendency to injure or that causes special damage. *Price v. Operating Engineers Local Union No. 3*, 195 Cal. App. 4th 962, 970 (2011). RMG cannot establish a claim for defamation because the Statements are true. Moreover, even if the Statements contained any tendency to mislead, the Statements comprise protected opinion. Thus, the Court should strike RMG's defamation claim under section 425.16.

a. RMG cannot prevail on its defamation claim because the Statements are true.

Truth is a complete defense to a defamation claim. *Hawran v. Hixson*, 209 Cal. App. 4th 256, 293 (2012). Moreover, a defendant need not justify the literal truth of every word of the allegedly defamatory matter. *Ringler Associates Inc. v. Maryland Cas. Co.*, 80 Cal. App. 4th 1165, 1180-81 (2000). It is sufficient if the defendant shows that the substance of the statement is true, regardless of slight inaccuracies in the details, so long as the imputation is substantially true. *See id.*

Here, the Statements are true. RMG owes Lenahan $13,200 for work Lenahan performed on behalf of RMG. (Lenahan Decl. ¶¶9-10.) RMG concedes that it has withheld this payment to Lenahan, supposedly because Lenahan's advertisements did not comply with RMG's terms. (TPC ¶11.) However, RMG cannot substantiate this argument. First, nothing in the Terms and Conditions or the Insertion Order defines the content of the advertisements Lenahan was permitted to circulate on behalf of RMG. (TPC Ex. A; Lenahan Decl. ¶3 & Ex. A.) Rather, the Terms and Conditions simply define the "Advertisement" as an "advertisement." (TPC Ex. A; Lenahan Decl. ¶3 & Ex. A.) Second, RMG specifically approved the content of Lenahan's ads. (Lenahan Decl. ¶6.)

The other Statement is also true. RMG owed Danna $14,080 for lead generation services he provided. (Danna Decl. ¶8 & Exs. A-B.) On or around September 18, RMG sent a wire to Danna's bank account. (Danna Decl. ¶9.) However, later that day, RMG

sought to reverse the wire, claiming that Danna had obtained the wire by fraud. (Danna Decl. ¶¶10-11.) As a result of RMG's efforts, Danna's bank froze his account. (Danna Decl. ¶9.) Only after Danna established that he was entitled to the wire, did the bank unlock Danna's account and cancel RMG's wire reversal. (Danna Decl. ¶12.)

Because RMG cannot produce any evidence to overcome Lenahan's evidence of truth, its defamation claim fails.

b. RMG cannot prevail on its defamation claim because the Statements are protected opinions.

In addition to their truth, the Statements cannot serve as a basis for RMG's defamation claim because the Statements comprise protected opinion. A statement is not defamatory merely because it is adverse or offensive to the plaintiff. *See Western Broadcast Co. v. Times Co.*, 14 Cal. App. 2d 120, 124 (1936). A statement that only sets forth the author's argument or ultimate conclusions is not defamatory. *See id.* The First Amendment of the U.S. Constitution compels this conclusion because "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz v. Robert Welch, Inc.*, 418 U.S., 323, 339-40 (1974).

The Ninth Circuit applies a three-factor test to determine whether a statement constitutes an opinion, stating:

> To determine whether a statement implies a factual assertion, we examine the totality of the circumstances in which it was made. First, we look at the statement in its broad context, which includes the general tenor of the entire work, the heated debate," the context supports the conclusion that statements are opinion subject of the statements, the setting, and the format of the work. Next we turn to the specific context and content of the statements, analyzing the extent of figurative or hyperbolic language used and the reasonable expectations of the audience in that particular situation. Finally, we inquire whether the statement itself is sufficiently factual to be susceptible of being proved true or false. *Underwager v. Channel 9 Australia*, 69 F.3d 361, 366 (9th Cir. 1995) (citations omitted).

Ultimately, the court must look at the totality of these circumstances to decide the natural effect of the statement on an average reader. *See Campanelli v. Regents of Univ. of*

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California, 44 Cal. App. 4th 572, 578 (1996). Whether a statement contains protected opinion is a question of law for the court to decide. *See Partington v. Bugliosi*, 56 F.3d 1147, 1152-53 (9th Cir. 1995).

In assessing the broad and specific contexts of a statement, courts look at the medium and format in which the statement appears. In the context of a heated debate on the Internet, readers are more likely to understand accusations of misconduct as figurative, hyperbolic expressions. *See Nicosia v. De Rooy*, 72 F. Supp. 2d 1093, 1106 (N.D. Cal. 1999); *see also Chaker v. Mateo*, 209 Cal. App. 4th 1138, 1150 (2012) (finding that ex-girlfriend's mother's statements that ex-boyfriend was a "deadbeat dad," that he "may be taking steroids," that people "should be scared" of him, and that he had picked up street walkers and homeless drug addicts, were opinions and thus were not actionable defamation, where mother posted the statements on a social networking website); *Summit Bank v. Rogers*, 206 Cal. App. 4th 669, 700 (2012) (finding that comments posted by bank employee on Internet message board that the bank was mismanaged and rendered poor service and that the bank's depositors would be well advised to move their accounts before it was "too late" and "before they close" constituted non-actionable opinion); *Rocker Managment LLC v. John Does*, No. 03-MC-33, 2003 WL 22149380, **passim* (N.D. Cal. May 29, 2003) (finding that after looking at the context, internet chat room poster's statements that investment management firm threatened analysts who were bullish on certain stocks, spread lies about those stocks, and was subject of SEC investigation, constituted statements of opinion). Here, the Statements were posted on the Facebook Group, a forum designed to further a heated debate about "Internet deadbeats," and to encourage and discourage publishers from working with specific publisher networks. Thus, the broad and narrow contexts indicate that the Statements were perceived as opinions.

Moreover, the contents of the Statements themselves are not sufficiently factual to be susceptible of being proved true or false. Lenahan wrote that he was entitled to $13,000 from RMG. Importantly, RMG does not dispute that it owed $13,000 to

Lenahan, but rather argues that it was entitled to withhold that payment because Lenahan's advertisements did not comply with RMG's standards. By comparison, Lenahan believes that his advertisements fully complied with RMG's standards. (Lenahan Decl. ¶3, 7 & Ex. A.) These beliefs reflect two sides of a debate, and thus the Statements contain opinions.

Similarly, the portion of the Statements addressing RMG's efforts to reverse the wire transfer to Danna consist of opinions. Importantly, RMG does not deny that it sought to reverse the wire. Rather, RMG presumably believes it was justified in trying to reverse the wire to Danna. By comparison, Lenahan believes that RMG sought to reverse the wire based on ulterior motives because Danna's advertisements complied with RMG's guidelines. (Lenahan Decl. ¶12.) Again, these beliefs reflect two sides of a debate.

Given the context and content of the Statements, a reasonable person would understand the Statements as expressing opinions. Because the Statements constitute non-actionable opinion, the Court should strike RMG's defamation claim.

2. RMG cannot establish any element of its claim for tortious interference with a contractual relationship.

To establish a claim for intentional interference with a contract, a plaintiff must show: a) a valid contract between plaintiff and a third party, b) the defendant's knowledge of that contract, c) the defendant's intentional acts designed to induce a breach or disruption of the contract, d) an actual breach or disruption of the contract, and e) resulting damage. *See Winchester Mystery House, LLC v. Global Asylum, Inc.*, 210 Cal. App. 4th 579, 596 (2012). The Court should strike RMG's claim for interference with contractual relations under section 425.16 because RMG cannot substantiate several elements of this claim.

As an initial matter, RMG's interference claim is entirely derivative of its defamation claim; *i.e.* Lenahan's supposed defamation caused the alleged interference. (TPC ¶¶48-49.) However, as discussed above, the Statements are not defamatory

because they are true and/or protected opinion. *See supra* Part B.1.b. A person cannot incur liability for interfering with contractual relations by giving truthful information, by using loose, figurative, or hyperbolic language, or by offering mere opinions. *See ComputerXpress, Inc. v. Jackson*, 93 Cal. App. 4th 993, 1014 (2001). Because the Statements are true and/or opinions, RMG cannot establish its interference claim, and the claim should be stricken.

Moreover, RMG has no evidence that Lenahan knew about any contract between RMG and a third party, which was supposedly disrupted. To the contrary, RMG undertakes efforts to prevent its publishers from learning the identities of RMG's other publishers. (Lenahan Decl. ¶8.) As a result, Lenahan did not know about the vast majority of people/businesses with whom RMG had contracted. Thus, RMG's interference claim fails for this reason as well.

To sustain its burden, RMG must also produce admissible evidence that a contract was breached or disrupted as a result of Lenahan's conduct. *See Woods v. Fox Broad. Sub., Inc.*, 129 Cal. App. 4th 344, 356 (2005). While RMG's complaint contains vague allegations of a "deteriorated" relationship, it does not identify this relationship nor explain how the relationship has deteriorated. Moreover, mere deterioration is not sufficient to sustain a claim for interference; rather, RMG must submit evidence that a contract was breached or disrupted. *See Tuchscher Dev. Enterprises, Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1240 (2003) (striking claim under section 425.16 where plaintiff had not produced evidence of any breach or disruption of contractual relationship). Lenahan does not believe that RMG can substantiate such a breach or disruption.

Finally, to establish its interference claim, RMG must produce admissible evidence that it suffered damages as a result of the supposed breach or disruption. Where damages are a necessary element of a claim, a plaintiff opposing an anti-SLAPP motion must submit prima facie evidence of those damages. *See Navellier v. Sletten*, 106 Cal. App. 4th 763, 775 (2003). As noted above, damages are a necessary element of a claim

for interference with contractual relationships. However, Lenahan does not believe that RMG can produce any credible evidence of damages.

For all of these reasons, the Court should strike RMG's claim for interference with contractual relations under section 425.16.

3. RMG cannot establish any element of its claim for tortious interference with a prospective economic advantage.

RMG's claim for interference with prospective economic advantage fails for many of the same reasons that RMG's other interference claim fails. To establish a claim for interference with prospective economic advantage, a plaintiff must show: a) an economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff, b) the defendant's knowledge of that relationship, c) intentional acts by the defendant designed to disrupt the relationship, d) an actual disruption of the relationship, and e) resulting damages. *See Marsh v. Anesthesia Serv. Med. Group, Inc.*, 200 Cal. App. 4th 480, 504 (2011). Moreover, the intentional acts by the defendant must be independently wrongful. *See Korea Supply, supra,* 29 Cal. 4th 1134, 1158-59 (2003).

As with RMG's claim for interference with contractual relations, RMG cannot establish many of the elements of its claim for interference with prospective economic advantage. To wit: a) RMG cannot show that Lenahan engaged in any independently wrongful conduct where the Statements are true and/or protected opinion, b) RMG cannot show that Lenahan knew about any relationship between RMG and a third party, c) RMG cannot show that an actual relationship was disrupted as a result of the Statements, and d) RMG cannot show any damages resulted from the supposed disruption.

Moreover, RMG has not alleged—let alone submitted evidence of—a concrete relationship with a third party that was likely to lead to an economic benefit for RMG. To establish a claim for interference with prospective economic advantage, a plaintiff must plead and prove the existence of an actual relationship that was likely to produce a

specific benefit, and not the mere speculative expectation that a potentially beneficial relationship will arise. *See Sole Energy Co. v. Petrominerals Corp.*, 128 Cal. App. 4th 212, 243 (2005). Thus, it is not enough for RMG to speculate that such a relationship exists or that a future benefit might occur. *See id.* Rather, RMG must submit evidence of an actual, existing relationship to establish a claim for intentional interference with prospective economic advantage. *See Salma v. Capon*, 161 Cal. App. 4th 1275, 1291 (2008). Lenahan does not believe that RMG has evidence of an actual relationship, which was likely to lead to an economic advantage, and which was disrupted by the Statements.

For all of these reasons, the Court should strike RMG's claim for interference with prospective economic advantage under Civil Procedure Code section 425.16.

CONCLUSION

For the foregoing reasons, Lenahan respectfully requests that the Court: a) strike Counts Three, Four, and Five from RMG's Third-Party Complaint, and b) award Lenahan the costs and fees he incurred in bringing this motion.

Respectfully submitted,

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